IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 4996 OF 2004.

Tippanna Amasidha Hatale. .... Petitioner.

versu.

Somanna Mahadappa Hatale & others. .... Respondents.

Shri Surel S.Shah for the Petitioner.

Shri G.S.Godbole for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 8th December, 2004.

P.C.:

1. On 16th June 2004, this Court issued notice for final disposal at admission stage. I have heard Shri Shah appearing for the Petitioner and Shri Godhole for the Respondent No.1/org.Plaintiff.

2. The challenge in this petition under Article 227 of the Constitution of India is to the order dated 27th February 2004 by which the Application at Exh.82 filed by the Petitioner has been rejected. The Petitioner is relying upon a Will which is admittedly produced on record. The prayer in the Application at Exh.82 is that the said will may be exhibited in evidence as according to the Petitioner, the same has been duly proved. The learned trial Judge after examining the evidence came to the conclusion that the Will is not duly proved and therefore, it cannot be exhibited and admitted in

evidence.

3. Shri Shah, the learned Counsel appearing for the Petitioner submitted that the Will has been duly proved in accordance with the provisions of the Indian Evidence Act, 1872. He submitted that even in the plaint execution of the Will is admitted. He, therefore, submitted that the learned Judge was not justified in holding that the Will is not proved.

4. Shri Godbole, the learned Counsel for the Respondent No.1 submitted that the order impugned can always be challenged in an Appeal which may be preferred against decree. He has invited my attention to the order of the learned trial Judge which is recorded in the deposition of the witness No.2 for the Petitioner. The learned Judge has observed therein that the objections raised by the Advocate for the Respondent No.1 for exhibiting the document will be decided at the time of arguments. He, therefore, submitted that no interference was called for. He submitted that the will is not duly proved in accordance with the provisions of law.

5. I have considered the rival submissions. While recording the evidence of Witness No.2 for the Petitioner, it appears that a prayer was made on behalf of the Petitioner that the Will has been duly proved by the said Witness No.2 and therefore, it should be

exhibited. An objection was raised by the Advocate appearing for the Respondent No.1 for exhibiting the said document on the ground that the same is not duly proved. The learned trial Judge directed and in my view rightly that the question of proof of the will have to be kept open and will have been decided at the time of final hearing of the suit. Thus it is clear that the learned trial Judge did not decide the issue regarding the proof of the Will. However, the Petitioners made an application at Exh.82 and prayed for a direction to exhibit the Will. In my opinion, in view of the earlier order passed by the learned trial Judge, the said Application could not have been entertained by the learned trial Judge. The correct and proper approach was to decide the issue at the time of hearing final argument. However, the learned trial Judge has considered the oral evidence and has rejected the said application. As stated earlier, in view of the earlier order passed by the learned trial Judge, the Application should have been heard and decided along with the suit. I am inclined to set aside the impugned order, as in my view, the issue regarding proof of will needs to be heard and decided at the time of final hearing of the suit.

6. In this view of the matter, I pass the following order:

(a) The impugned order dated 27th February 2004

is quashed and set aside.

(b) The learned trial Judge will consider the application at Exh.82 while deciding the suit finally. The learned trial Judge will allow both the parties to make submissions on the question of proof of will at the time of final arguments.

(c) Rule is made partly absolute in the above terms with no order as to costs.

(d) It is made clear that all questions on merit are kept expressly open.

(e) Parties and the concerned Court to act on the authenticated copy of this order.

Judge.